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VOLUNTARY ASSUMPTION OF RISK.[1]

II.

IN one case only, in the absence of a statute imposing upon the master the duty of affording the servant some particular protection, could the servant, before the passage of the Employers' Liability Act of 1880, recover if he knew of the condition which the master's negligence had created. This was where the servant had complained to the master and had received a promise that the defect should be repaired. Cockburn, C. J., in Clark *v.* Holmes,[2] says: "The danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept. There is a sound distinction between the case of a servant knowingly entering upon a contract to work on defective machinery, and of one who, on a temporary defect arising, is induced by the master to continue to perform his service on a promise that the defect shall be remedied. In the latter case the servant by no means waives his right to hold the master responsible for any injury which may occur from the omission of the master to fulfil his obligation." And Byles, J., says: "The original contract was to work with fenced machinery, and it

[1] Continued from 20 HARV. L. REV. 34.

[2] 7 H. & N. 937. There was, in fact, a statute requiring the machinery to be fenced. Cockburn, C. J., however, thought it unimportant to determine "whether the duty exists by virtue of a statute or at common law." While Bowen, L. J., cites it as authority for the proposition that where a statutory duty exists, the plaintiff's mere knowledge of its violation is no bar to recovery, the case had been usually treated as authority only on the point stated in the text.

was his master and not he who violated the condition and in so doing exercised a species of compulsion over the servant." The duty of the master herein stated to take care to prevent the plant from deteriorating from the condition in which it obviously was at the time the servant entered into it was one well recognized in the earlier cases.[1]

The case of Clark *v.* Holmes was therefore novel only in this, that it regarded the promise of repair as removing from the servant the bar to recovery which his knowledge would otherwise have presented. While this case has been followed with practical unanimity by all American jurisdictions, it was disregarded in Scotland in Crichton *v.* Keir,[2] where it was decided that a servant having been induced to continue in an employment by a promise of a young and efficient horse in the place of an old and inefficient one, could not recover for injuries received by continuing to work with the old horse, pending the performance of the master's promise. "A servant who in the face of manifest danger chooses to go on with his work, does so at his own risk and not at the risk of his master."[3]

On the whole the decision of the Scottish court would seem to be in absolute conformity with the spirit of the earlier English cases. It would seem to be impossible to distinguish on principle between the case where a servant with knowledge that the master had permitted the plant to get out of repair had continued to serve after complaint in fear of dismissal, and the case where he had been induced to continue serving because of a promise to repair. It is quite clear that the servant does not seek to recover upon the theory that the master's promise to repair amounts to a contract to do so, nor in Clark *v.* Holmes is the action founded upon the breach of such a contract. The same effect is given to a promise to repair whether made by the master himself, and therefore one which would bind him, or made by a subordinate who has no such authority; nor is it necessary that the promise has been made to the plaintiff himself if he actually knows that such promise has been made.[4] The theory upon which the servant is debarred from recovery if he continues to work with obviously defective

[1] And it is stated by Lord Cranworth in Bartonshill Co. *v.* Reid, 3 Macq. H. L. Cas. 266, and is recognized by Kelly, C. B., in Murphy *v.* Phillips, 35 L. T. (N. S.) 477.

[2] McPh. 407.

[3] Lord Justice Clark Inglis. This case was followed in Frazer *v.* Hood, 15 Rettie 158, and in Wilson *v.* Boyle, 17 Rettie 62.

[4] 216 Ill. 624.

tools is that, he being free to remain or leave, his relation to the master is purely voluntary, and therefore one which he has no legal right to continue in. The master therefore can annex to its continuance, as he could to its creation, whatever conditions he pleases. The master's promise neither coerces him into remaining in the position nor deceives him as to the conditions under which the work is to be performed. He knows that the tool is dangerously defective. He is willing to work with it temporarily and until it can be repaired; but whether there is a promise of repair or not, he is fully cognizant of the risks of an existing defect, and is willing to undergo them rather than lose his place. The fact that the risk is temporary and not permanent may render his act more prudent, but it cannot make it any the less voluntary. It may be perhaps true that a servant may be willing to run a temporary risk rather than lose a permanent job, but in the end the inducing cause which leads him to accept the risk is the desire to retain his employment. The quantity of pressure therefore may be less, but the pressure is of the same sort, and is not one proceeding from the master, but from the servant's own necessities and desires. If, on the contrary, the contract of employment is regarded as giving the servant a right as against his master to remain in his employment, it would follow that even though the master did not promise to repair he should not be allowed to put the servant to the alternative of abandoning his right to serve, or running a risk therein due to the master's failure to perform his obligation. The case in reality represents a reaction against the rigor of the rule that a servant takes the risk of all known defects. The master has intended the servant to remain; that he offered inducements to do so shows that it was to his advantage; it would seem repugnant to natural justice to regard the servant as acting of his own independent volition and at his own risk because he yielded to the master's request. It would seem, therefore, that the conception of the court that the servant shall not thereby assume the risk incident to such action is, on the whole, just and fair, though perhaps not to be justified by any strict analysis of the principles applicable to this class of cases.

Save when such promise to repair was given, the servant's knowledge of the defect negatived at common law the existence of any duty on the master's part in relation to it. So, in Griffith *v.* St. Katharine's Docks,[1] the action, though brought after the

[1] 13 Q. B. D. 259 (1884).

Employers' Liability Act of 1880, was not founded upon it. It was decided[1] that a declaration which failed to allege not merely that the master was negligent, but that the servant was ignorant of the danger thereby created, was fatally defective.

Upon the passage of the Employers' Liability Act of 1880[2] the question at once arose whether it had made the master liable to the workman for injuries received by reason of defective conditions in the machinery and plant which were known or obvious to the workman.[3]

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[1] Brett, M. R., and Bowen and Fry, L.JJ., affirmed the decision of Day and A. L. Smith, JJ., in 12 Q. B. D. 493, Brett, M. R., saying that this was decided many years ago in Priestly *v.* Fowler. The same principle had been uniformly announced in the intervening cases; so in Williams *v.* Clough, 3 H. & N. 258, it was decided that the declaration must allege the ignorance of the servant of the defect which injured him, and that the declaration in question did sufficiently allege this by stating that the plaintiff, "believing the ladder to be in good condition and not knowing the contrary," used it and was hurt. Lord Bramwell differed to the extent of holding that the declaration should have shown that the plaintiff had no means of discovering the defect. It is clear, however, that while the servant may be bound to take notice of plainly inherent risks in obvious physical conditions, he is not bound to notice those defects which only an inspection would disclose. R. R. Co. *v.* Swearingen, 196 U. S. 551; R. R. Co. *v.* McDade, 191 U. S. 564. In Vose *v.* R. R., 2 H. & N. 728, in the course of the argument (p. 732), the opinion of the court is plainly indicated that it must appear that the servant's ignorance of the defect is plainly alleged, or that the defect as described in the declaration must be one which indicates that the plaintiff could not have known of its condition, explaining Roberts *v.* Smith, 2 H. & N. 213, upon this ground. See also, to the same effect, Bramwell, B., in Dynen *v.* Leach, 26 L. J. Exch. 221.

[2] The sections material to the present discussion are: section 1, providing in substance that "where personal injury is caused to a workman; by reason of any defect in the ways, works, machinery, or plant (subsection 1) . . . the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman nor in the service of the employer"; subsection 5 and subsection 3 of section 2, "A workman shall not be entitled to compensation . . . where the workman knew of the defect . . . and failed within a reasonable time to give . . . information thereof to the employer . . . unless he knew that the employer . . . already knew of the said defect."

[3] It would seem that the question of the servant's assumption of risk is about to be of great importance in the federal courts of the United States in consequence of the passage by Congress of the Act of June 11, 1906, Statutes of the 59th Congress, p. 232, which not only destroys the defense of fellow employment in suits by employees against railroads engaged in interstate commerce, but provides that the plaintiff's contributory negligence shall in all cases be left to the jury. However, since the servant's assumption of risk is recognized with practical unanimity as quite distinct from the defense of contributory negligence (Day, J., Choctaw R. R. *v.* McDade, 191 U. S. 64), it would appear that the servant may still be barred from recovery by knowledge, real or constructive, of the defective condition of the railroad's plant or premises to the same extent and in the same manner as before the passage of this act, which otherwise, but

In Weblin *v.* Ballard[1] A. L. Smith, L. J., held that the act put the workman when he sues the master under its conditions in the position of one of the public suing. The master shall have all the defenses which he would have had as against one of the public, but shall not have the several defenses he theretofore had when sued by a servant. He comes therefore to the conclusion that the defense of common employment when a fellow servant's negligence occasions the injury, and the defense that the servant had contracted to take on himself the known risks attendant upon the employment, being both in his opinion defenses peculiar to the relation of master and servant, are taken away by the act, and that the master "not having shown that the servant had used what was [to his knowledge] dangerous in a negligent manner," the latter was entitled to recover.

In Thomas *v.* Quartermaine[2] the plaintiff knew of the existence of the vat into which he fell, knew that it was unfenced and that his duties would require him from time to time to do work near it. On the occasion when he was injured, he went into its vicinity without orders and without complaint and attempted to remove a plank. In some way it stuck, and when it did give way he fell back with it into the vat. It was held that the plaintiff, though found by the jury not guilty of contributory negligence, could not recover, having entered and continued in the defendant's service with full knowledge of the conditions and the risks attendant thereon. Bowen, L. J., who delivered the principal opinion,[3] while agreeing with Smith, L. J., that the act merely placed the servant substantially in the same position as one of the public, differs from him entirely as to the consequent effect. In his opinion the defense of common employment, being alone peculiar to the particular voluntary relation of master and servant, is alone destroyed by the act; that of the so-called assumption of risks is incident to any and all voluntary relations and so is untouched by it. It is in fact not, strictly speaking, a defense. The plaintiff fails, not because barred by his acquiescence in the defendant's breach of duty, but because the defendant owes to the plaintiff no duty save of full disclosure. The statute, he says, "merely gives the servant

for the in general high character of federal juries, would practically impose on the railroads the payment of a compulsory pension to injured employees.

[1] 17 Q. B. D. 122.

[2] 18 Q. B. D. 485.

[3] Fry, L. J., agreeing with him; Brett, M. R., dissenting.

in regard to those matters to which it relates the same rights as if he were not a workman, and cannot, save by a violent distention of its terms, be strained into an enactment that the workman shall have the same rights as if he were a workman, and other rights in addition." In a word, the act, while relieving the servant from the disadvantages peculiar to this particular relation, does not impose upon the master any duties other than those due to persons who of their own free will come on his premises.[1]

"The workman must still prove how he is on the defendant's property, and to do this he must show his license by the contract of employment.[2] The contract of employment shows to what class of licensee he belongs; not a bare licensee using for his own personal purposes the owner's property, but one invited to come for a purpose in which the owner, his master, has an interest as well as he, the servant; and the master's duty to him, while no less, can be no greater than to any other licensee for a similar purpose. At common law the occupier's duty to such licensees was merely to take care that the property should not contain any unusual or hidden and so unexpectable or non-apparent defect. His duty was not to make the premises safe, but to make it as safe as it looked — to remove a hidden danger or make it known.[3] If the physical condition and the danger incident thereto were obvious, it conveyed its own notice, but just as an actual notice must be capable of being understood by the class to whom it is addressed, so the physical conditions must be apparent and their dangerous nature appreciable, and the owner's duty varied with the apparent ability of the licensee to understand." An express notice written in English would be quite insufficient where only Italians were employed, and though

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[1] So Lord Young, in Morrison *v.* Baird & Co., 10 Rettie 271, says at p. 278: "The act does no more than remove a defense which was previously competent by providing that the employer against whom such action is raised shall not in certain circumstances specified in the statute be entitled to plead what the common law entitled him to plead, that he is not responsible to one employee for the fault of another.

[2] Field, J., in Griffith *v.* Dudley, 9 Q. B. D. 357.

[3] He cites as authority Kelley, C. B., in the Court of Exchequer Chamber, in Indermaur *v.* Dames, L. R. 2 C. P. 311: "Is he [the invitor] not bound to put a fence or safeguard around the hole, or if he does not, to give [the invitees] a reasonable notice that they must take care and avoid the danger." Willes, J., in the same case in the Common Pleas, L. R. 1 C. P. 274, p. 288, says: "a visitor . . . is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows or ought to know"; and calls attention to the distinction made in Wilkinson *v.* Fairrie, 1 H. & C. 633, "between ordinary accidents and accidents from *unusual, covert* danger."

the open patent condition may be sufficient warning to an intelligent adult, any owner or master would realize that it could mean nothing to a child or an ignorant foreign peasant. So, says Bowen, L. J., "mere knowledge of the defect is not volition, there must be not merely knowledge of the physical condition of the premises, but appreciation of the risk involved therein," [1] and he adds, "the risk must be voluntarily encountered." What does he mean by voluntarily? He says: "There may be facts which justify the inquiry whether the risk though known was really encountered voluntarily; the injured party may have a statutory right to protection, or again the plaintiff may have a common right or an individual right at law to find these particular premises free from danger. The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of the danger which but for a breach of duty on his own part would not exist at all." If there be a basis for the alleged duty other than the mere voluntary relation of master and servant, which, like that of licensor and licensee, creates no obligation save that of full and fair disclosure of actual conditions, — a basis, such as a statutory enactment or a common or individual right to find the premises safe, generally springing from the fact that the plaintiff's right to go on the premises is independent of the mere consent of the owner,[2]

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[1] In Yarmouth *v.* France, 19 Q. B. D. 647, Lord Esher is astonished at this statement. So he says: "A dull man can recover damages when a man of intelligence cannot! Both knew of the danger, but one is imperfectly informed of its nature and extent!" No doubt it is unnecessary that the plaintiff shall be able to appreciate the precise extent of the danger or the gravity of the threatened injury (see Feely *v.* Pearson Cordage Co., 161 Mass. 426). Nor does Lord Justice Bowen mean to say that it is necessary. Had Lord Esher said, "both knew the physical condition; one could and did appreciate that it entailed danger, the other neither could nor did," he would more accurately express Lord Justice Bowen's meaning. So stated, it is an absolutely accurate statement of the common law. Since Grizzle *v.* Frost, 3 F. & F. 622, it has been regarded as settled law that the master, if he chose to employ children, owed a duty to warn and instruct them as to dangers which, though obvious to the normal adult, they were from their youth and inexperience manifestly unable to appreciate. The same duty is of course due to those who through inexperience or manifest ignorance are palpably incompetent to appreciate the dangers inherent in obvious conditions. In America, where the decision of the majority of the court in Yarmouth *v.* France has met with practically no support, either in the construction of similar Employers' Liability Acts or in cases arising at common law, this distinction is everywhere recognized, and it is held that no risk is assumed unless the danger is such as to be obvious to that class of persons to which the servant belongs. See Wagner *v.* Chemical Co., 147 Pa. St. 475; Weiss *v.* Bethlehem Iron Co., 100 Fed. Rep. 45.

[2] See, for a classification of these rights and an analysis of their basis, p. 19, *ante.*

— then and only then can his encountering a known peril be considered as other than voluntary.[1]

"But," he says, "where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured party knowing and appreciating both risk and danger voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all."

In the case of Yarmouth *v.* France[2] the facts showed that the plaintiff had been employed to drive horses in a mine; after he had been some time in the service, a vicious horse was supplied to him; he complained and was told to go on and use it. There was some evidence that the superintendent who told him to continue work had said that he would be protected, that his employer would be responsible if injury resulted. The majority of the court, Lord Esher, and Lindley, L. J., held that it was a question for the jury whether the plaintiff had freely and voluntarily assumed the risk of injury by continuing to work after making complaint. Fear of losing his job is regarded as a pressure destructive of the servant's freedom of choice, and the jury might consider the servant's complaint and the superintendent's assurance that the employer would be responsible not as a contract binding on the master and creating a liability, for the superintendent had no authority to make such a promise, but as bearing on the question as to whether the servant had intended to assume the risk. Lindley, L. J., considers that the act leaves the servant free to engage to incur a particular danger, and that he does so when he enters a business either in its nature or from the way it is conducted openly and inherently dangerous, but says: "In the cases mentioned in the act a workman who never engaged to encounter a particular danger but who finds himself exposed to it and complains of it, cannot, as a matter of law, be said to have impliedly agreed to incur it, or to have voluntarily incurred it because

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[1] Even had there been a statutory duty to fence the vat, it would seem that if it is ever permissible under the English practice to withdraw a case from the jury because an affirmative defense has been conclusively established, the court might here hold that no jury could reasonably find that the plaintiff had acted in other than a purely voluntary way. There were no orders, no complaint; the servant did what he did, went where he went, of his own free choice. There appears to be an entire absence of evidence of any species of compulsion.

[2] 19 Q. B. D. 647.

he does not refuse to face it. If nothing more is proved than that the workman saw the danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury might properly infer . . . fear of dismissal rather than voluntary action."[1]

Lord Esher's opinion is in effect based upon a construction of the act imposing on the master the duty under section one of providing a reasonably safe plant, including the system and rules of work, toward all workmen, not merely those who are ignorant of the true condition of affairs.[2]

The real point of difference between Bowen, L. J., and Lord Esher and Lindley, L. J., is in fact in one thing only. Bowen believed that there was no duty beyond that of full disclosure. Lord Esher and Lindley, L. J., believed that there was a duty to do more, — to take care to make the plant reasonably safe: Lord Esher holding that the act properly construed gives the right to such a duty; Lindley, L. J., that the servant has a right to have the plant kept up to the standard, which, so far as it was called to his attention, existed when the contract was formed. Once grant the duty and all agree[3] that mere knowledge of its breach will not bar the plaintiff; a real consent to waive the wrongdoer's liability must be shown, either express,[4] in which case the question is one for the court as to whether such a consent is or is not contrary to the spirit of the act creating the duty, or implied from the circumstances, which is, save in an absolutely plain case, a question for the jury.

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[1] Compare his statement in Smith *v.* Baker in the Court of Appeal, 5 L. T. 518.

[2] Lord Esher, M. R., seems to have completely misunderstood Bowen, L. J., whose opinion in Thomas *v.* Quartermaine he professes to follow. He seems to think that Thomas *v.* Quartermaine was decided on the ground that though the defendant had been guilty of a breach of duty the plaintiff's conduct showed conclusively that he had of his own free will and with compulsion or fear of dismissal unnecessarily gone to meet the danger, — a question which he says should properly have gone to the jury. In fact, as has been seen, Lord Justice Bowen holds that the defendant is not liable because under no duty, in the absence of a statute expressly imposing it, to correct known and appreciated dangerous conditions, since the relation of master and servant is voluntary and not of right. The dissent of Lopes, L. J., in Yarmouth *v.* France is based upon this view of Lord Justice Bowen's opinion and an acceptance of the law as there announced.

[3] In Thomas *v.* Quartermaine, Bowen, L. J., says that if the plaintiff has a common or individual right to find the premises free from danger, "the defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with the knowledge of the danger which but for a breach of duty on his own part would not exist at all."

[4] As in Griffith *v.* Earl of Dudley, 9 Q. B. D. 357.

On the whole, taking into consideration the third subsection of section two of the act of 1880, that if the workman knew of the defect and "failed within a reasonable time to give . . . information thereof to his employer," he shall be disentitled to recover, it would seem that Lord Esher's construction is probably correct, and that Bowen, L. J., gave too limited an effect to the provision in supposing that Parliament had only meant it to apply to the cases where, the servant having given notice of a defect, the master had promised to remedy it, or where some particular precaution had by statute been laid upon the master,[1] and so gave too narrow a construction to the act. It would seem that the act was designed to protect the workman from the pressure of his necessities — to equalize his economic inferiority — by which, as experience had shown, he had been prevented from procuring stipulations in his contract of employment adequately protecting him from dangers, from which he could not guard himself while the master could guard him, and to do for him as a class what the Railway and Canal Act of 1834 had done for shippers of goods. To remove therefore one only of the disadvantageous legal incidents to the so-called voluntary relation into which his wants must needs whether or no force him, would be to ignore the real intent of the act and to defeat rather than effectuate the result which Parliament apparently designed to accomplish.

Lord Lindley arrives at the master's duty in another way. His position is practically that of Lord Cockburn and Byles, J., in Clark *v.* Holmes,[2] that it is the master's duty to take care that the condition of service shall not change for the worse. He distinguishes sharply between dangers which exist when the employment begins and those which come into existence afterwards. The first the servant accepts if he knows of them, the latter not unless he voluntarily and freely consents to incur them.[3] This position would seem to be logically sound, whatever view may be taken of the

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[1] These were the only cases to which the subsection could apply, according to his construction of the act, for these were the only cases in which he considered that the master owed any duty to a servant who knew of a defect. The other cases given are cases which fall outside the relation of master and servant, and are cases where the plaintiff, apart from the voluntary consent of the defendant, has a right to be upon the premises or use the appliances, and so is entitled of right to find them safe.

[2] 7 H. & N. 937.

[3] He does not intimate under which head he would place conditions actually existing when the service begins but the danger of which is not appreciated until the servant has been at work for some time.

true basis of the master's freedom from liability for injuries resulting from known dangers.[1]

If the true basis be that it is presumed to be an implied term of the contract of service that the servant assumes the risk of the conditions under which he knows he must work, such assumption is the creature of a contractual intent, though one fictitious and presumed to exist in spite of the absence of any evidence of actual consent, and contractual intent must be ascertained as of the time of entering into the contract and in the light of then known conditions, not of after discovered facts. What policy of the law can demand the imposition upon a relation, already sufficiently unequal, of a presumed intention to assume the risk of any danger which the master in breach of his admitted moral obligations and of the implied terms of his contract[2] may see fit to create in the future?

If, on the contrary, the basis of the servant's liability to recover for injury resulting from a known danger is, as it probably is, that to a relation voluntarily created or continued no duty adheres to either party save that of fair disclosure of the conditions under which it is to be formed or continued, it would seem that if there is not a mere service from day to day but a binding contract for a definite term formed in ignorance of any danger, the servant has, by virtue of the contract, what Bowen, L. J., calls "an individual right to be upon the premises," and to find them as safe as they were originally,[3] and if the master puts him to an election between foregoing such right and incurring a risk, his choice of the latter should not be regarded as voluntary. None the less the effect of the decided cases is strongly opposed to Lord Lindley's distinction,

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[1] In Davis *v.* Forbes, 171 Mass. 548, Knowlton, J, in a dissenting opinion takes much the same position as Lindley, L. J. He distinguishes between dangers of which the servant is or should be aware when he enters the service and those which supervene afterwards. He says: "The master by his contract impliedly agrees to furnish safe appliances. . . . There is no new contract nor any new consideration for a contract when the plaintiff obeyed the order to use the defective appliance. The rights and obligations created by the contract of hiring remained unchanged."

[2] The theory which regards the assumption of risk as an implied term in the contract of service regards the master's duties as to the condition of his plant in the same light — a breach of these duties is a breach of his contract, and the servant may leave and sue as for wrongful dismissal.

[3] Lord Bramwell admits (Smith *v.* Baker, [1891] A. C. 346) that in such a case to allow the premises to deteriorate is the breach of an implied term of the contract of service which entitles the servant to leave, and bring suit for damages as for wrongful dismissal. See also Devens, J., Leary *v.* R. R., 139 Mass. 580, *accord.*

unless there is complaint and a promise to repair.[1] It may well be that the common law conception of contractual obligations and rights has been so tinged by their procedural development that the right so created was regarded as at best a mere right of action for damages for the loss of the benefit expected, unless some definite, well-recognized common law relation, such as that of landlord and tenant, was created; and even then the right adhered to the relation and was not the creature of the contract creating the relation. At common law there was no right to such benefits at all; the procedural development went along the lines of a right of action on the case in the nature of deceit to recover for damage suffered by reliance on a false promise, instead of treating contracts as being, like covenants, grants of the benefit intended and so conferring a right to receive it. Equity, by specifically granting specific performance of certain contracts, gave to rights thereunder a semblance of property. But at common law none of the summary remedies which the law deemed appropriate for the assertion of rights inherent to citizenship or the ownership of property was available to enforce the right to merely contractual benefits.

A citizen whose inherent rights were invaded could justify force or the undergoing of a known risk to assert them. One who was denied a contractual benefit could not seize upon it; it may well be that neither can he justify incurring risk to obtain it. He has bargained for a benefit; he has, by the grace and through the ingenuity of the court, been given a novel action for damages for its loss. So much the law would give, but no more. He had no right to the thing bargained for. Such being the original attitude of the common law, where equity refuse to grant specific performance, as in all save extraordinary contracts of employment (and then only to the master), it is natural that courts should say, as Lord Bramwell[2] and Devens, J.,[3] in effect said, "if a new danger is created let the servant leave the employment and sue for the breach of his contract if he has one." This attitude, however, in view of the universal recognition[4] that contracts of service do confer rights with

[1] From Priestly *v.* Fowler (1837) to Williams *v.* Manchester, [1899] 2 Q. B. 638, the fact that the defect arose subsequent to the engagement has been considered of no moment. See also Lamson *v.* Co., 177 Mass. 145; Bajus *v.* R. R., 103 N. Y. 312, and Labatt, Master & Servant, §§ 283, 384.

[2] Siner *v.* R. R. and Smith *v.* Baker.

[3] Leary *v.* R. R., 139 Mass. 580.

[4] Beginning with Lumley *v.* Gye, 2 E. & B. 216 (1853), and Bowen *v.* Hall, 6 Q. B. D. 333 (1881).

which third parties may not interfere, seems ultra-conservative, in fact, reactionary.

The case of Smith *v.* Baker,[1] while it is taken to have finally settled the law in accordance with the decision of the majority in Yarmouth *v.* France, adds little that is new. In that case the plaintiff was injured while working in a railroad cutting by a fall of a stone from a derrick. It was not shown that the derrick was in bad order. He knew that it was the practice to jib stones from the cutting without giving any warning to the servants, they being expected to work while the stones were passing overhead. He had complained to his fellow workmen of the danger incident to this mode of doing the work. In the County Court the jury had found that the defendant was guilty of negligence. The Divisional Court and the Court of Appeal both found that there was no evidence of negligence.[2]

The question was brought up to the House of Lords in such shape that the majority of the court considered that they were debarred by the County Court Act of 1888 from considering the question of the defendant's negligence, and that they were confined to the effect of the plaintiff's continuance in the service after he knew that no warning could be expected of the jibbing of stones over his head as barring him from recovery.

While the question of the physical insufficiency of the defendant's plant was closed to investigation by the verdict of the jury, it by no means follows that the defendant's negligence in the sense of his breach of a duty owed to the plaintiff in relation thereto was not open to discussion. As Bowen, L. J., pointed out in Thomas *v.* Quartermaine (an opinion quoted with approval by all the judges), the plaintiff's knowledge of the danger goes to the denial of any duty owing to him by his master. The question of the defendant's negligence would appear therefore to depend upon the servant's knowledge of the danger, unless the court held that either at common law or under a proper construction of the statute the

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[1] [1891] A. C. 325.

[2] In the Court of Appeal Lord Justice Coleridge said that the plaintiff had engaged to perform dangerous work and having taken the risk could not recover. "There never was a doubt of that doctrine before the Employers' Liability Act, nor had there been a doubt since. The supposed difficulties which arose from the decision in Yarmouth *v.* France where the workman was not engaged to perform dangerous work, are not in question now." Lord Lindley said: "The plaintiff in Yarmouth *v.* France was employed to drive a cart, and a vicious horse was put upon him and he complained. He was not employed to break or drive vicious horses."

master owed to his servant a duty to protect him from patent as well as latent dangers.

While there is only one dissenting opinion, there is an extraordinary divergence in the reasons given by the various law lords. Two (Lords Halsbury and Herschell) hold that at common law it is the master's duty to establish a safe and proper system for using even perfectly sound machinery, and that in regard to a breach of this duty the servant's knowledge of the defective system does not bar recovery. Unless there is some peculiarity about this particular duty distinguishing it from all other duties owed by the master, and none is pointed out, the unanimous trend of English authority before the Employer's Liability Act is against this position. The sole authority for it is a Scotch Court of Sessions case[1] cited with approval by Lord Cranworth in a dictum in a Scotch appeal to the House of Lords.[2]

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[1] Sword *v.* Cameron, 1 Sc. Sess. Cas. (N. S.) 493.

[2] Bartonshill Colliery Co. *v.* Reid, 3 Macq. H. L. Cas. 266, at p. 300. What Lord Cranworth was addressing himself to was to show that, notwithstanding the opinion of the Lord Justice Clark Hope in Dixon *v.* Rankin, 14 Dunlop 420, the doctrine of common employment had no place in the law of Scotland, and that "no clear settled course of decision in Scotland imposed on the House of Lords the necessity of holding the law of that country to be different from the law of England" on that point. Now, in Sword *v.* Cameron the plaintiff had been injured by a fellow servant, Duff, exploding a blast before he had reached a place of safety. It was shown to be customary to allow an insufficient time between the warning and explosion. Of this and presumably of the attendant danger the plaintiff was fully aware. To prove his point Lord Cranworth says that the decision in favor of the plaintiff can be justified on the ground that the injury resulted not from the mere personal neglect of Duff, the fellow servant, but from the fact that he was acting in obedience to a system defective in not adequately protecting the workman at the time of explosion. Now, in Sword *v.* Cameron Lord Mackenzie laid particular stress on the fact that Duff knew of the plaintiff's proximity when he fired the blast. The case was actually decided on Duff's almost wanton negligence and the master's responsibility therefor. In addition he says that even if the pursuer "had walked up to the blast and sat upon it, it could scarcely be pleaded that Duff should have fired the shot so that if the pursuer wished to be blown up he should be indulged." In such a case it could scarcely be said that any system of blasting would make the master answerable for such a wilful wrong of a servant; even the servant's personal liability would depend on nice questions of the limits of lawful consent. See Bell *v.* Hansley, 3 Jones (N. C.) 131; Reg. *v.* Coney, 15 Cox C. C. 46, per Hawkins, J., and Com. *v.* Colberg, 119 Mass. 351. But the whole opinion shows a paternal attitude on the part of the Scotch law probably derived from its origin in the civil law, — a taking by the courts upon themselves the power to judicially supervise the manner in which such businesses should be conducted, so as to protect the servants from injury quite irrespective of the servant's knowledge of the danger or consent to encounter it, — an attitude which, whether economically sound or not, is the very reverse of the individualistic tendency of the English law. In Bartonshill Colliery Co. *v.* Reid the injury was caused solely by an engineer's negligent

Lord Watson, while apparently concurring in this view, attached more weight to the effect of the Employers' Liability Act, in this respect adopting the construction which Lord Esher put upon the act in Yarmouth *v.* France. Lord Halsbury, in addition to his reliance upon the case of Sword *v.* Cameron, seems to be of the opinion that the plaintiff must have consented to the particular thing done; he says, "the plaintiff in this case did not consent to the particular stone being slung over his head. His position was such that he could not look out for himself and could not know when stones were being slung. The defendants must go to the extent of saying that wherever a person goes where there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. The maxim applies equally to a stranger, and if applicable to this extent, no person ought ever to have been awarded damages for being run over in London streets, for no one (at all events before the admirable police regulations of late years) could have crossed London streets without knowing that there was a risk of being run over."[1] He fails, however, to notice this distinction, every person has a common right to cross streets, the servant has only the right to be in the master's employment by the consent of the master. The distinction which he draws between a danger which the plaintiff knows his own action will on the particular occasion bring upon him, and those dangers which are involved in the general conditions of the work in which he consented to engage, appears to indicate that, in his opinion at least, there is no acceptance of the general risks of the bad condition of the plant involved in the mere continuance of work with such defect. It is difficult to say precisely what sort of consent to undergo a particular known danger will bar in Lord Halsbury's opinion the servant's recovery. If he had known that stones were being slung over his head and had stayed at work because he did not wish to take the trouble to move, clearly his act would have been in every sense voluntary; if, on the contrary, the workmen were not allowed to leave their work to

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mismanagement of a perfectly sound elevator totally unknown to the plaintiff, and not to any obvious defect in either system or machinery. No question was raised of the effect of the servant's knowledge as a bar to his recovery. It is indeed strange to find that Lord Cranworth, by distorting a Scotch case so as to bring the Scotch law into conformity with that of England, should be thought to have furnished authority for subordinating the English law to that of Scotland.

[1] This is practically the same illustration given by Mellish, L. J., in Woodley *v.* R. R., L. R. 2 Exch. 384.

seek safety (and most probably the warning was omitted to prevent just such interruptions), he would, had he known of the slinging of the stone, have still been reduced to the alternative of facing the risk or losing his position. As Lord Herschell points out, "if the inevitable consequences of the employee discharging his duty is obviously to occasion him personal injury, it may be . . . if he continued to perform his duty" and is injured, he could not maintain an action. Here, however, is more than a mere voluntary subjection to a risk; it would be a subjection to an imminent peril which no prudent man would face, — it would be that earliest form of contributory negligence, a casting of oneself upon a certain danger in the unreasonable insistence upon one's extreme rights.[1]

Lord Bramwell in his dissenting opinion stoutly upholds his conception of voluntary action. If the muscles are left free to respond to the will, if no overpowering force be exerted, he can conceive of no pressure of external conditions upon the will sufficient to destroy volition.[2]

It will be noticed that while the defective system was in existence when the plaintiff was employed, there is no evidence that he learned of it until afterwards. In fact such defects would normally come to the attention of the servant only after he had entered upon his employment. While the case therefore does not necessarily involve more than is included in the opinion of Lord Lindley in Yarmouth *v.* France, that the servant, by continuing in an employment with knowledge that the conditions existing therein when engaged have been changed, does not accept the risk thereof by not throwing up his job, it is accepted, in Williams *v.* Birmingham Co.,[3] as authority for the proposition that mere knowledge of the

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[1] See Cruden *v.* Feltham, 2 Esp. 685, and Clay *v.* Wood, 5 Esp. 44, n. 2, p. 17, *supra.*

[2] Lord Morris, while agreeing with the majority of the court, bases his decision upon the fact that the verdict of the jury established that the machinery was defective (and this is evidently the correct interpretation of the verdict, for apparently the question of the defendant's negligence in failing to give a proper warning was first raised in the House of Lords), and therefore, while the plaintiff knew that no warning was to be given, he did not know that the machinery was defective. While he thus assumed the danger of working without warning, he did not assume the unknown risk of an injury resulting from the fall of a stone due to the defective machinery. He adheres, however, to Lord Justice Bowen's statement that, both at common law and under the act, "where the injured party, appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of commission or omission, no evidence of negligence."

[3] [1899] 2 Q. B. 638.

risk does not necessarily involve consent to undertake it in a case where there was a patent dangerous defect in the company's plant at the time of employment. In England, therefore, today it may be taken as settled law that mere knowledge of a dangerous defect in the plant or system of work, whether existing at the time of employment or supervening thereafter, does not debar the servant from recovery. He may waive the protection of the Employers' Liability Act by expressed consent[1] or by a consent to waive it implied from the circumstances, but such consent cannot be presumed from his mere continuance in the employment. It is always a question for the jury whether his conduct has expressed a free and voluntary consent to waive his right to protection.

In Massachusetts this question has received extended consideration. In Fitzgerald *v.* Paper Co.[2] it was decided that a servant assumes all the risks of which she knows and appreciates when she enters the master's service, attended upon the conditions under which he conducts it. But the court seems to adopt Lord Halsbury's distinction between voluntarily encountering a particular risk upon a particular occasion, and the acceptance of an indefinite future risk which might or might not arise out of the conditions known to the servant. In this case the plaintiff slipped upon stairs which were covered with ice and snow. The plaintiff knew that ice must form from time to time on the steps from the steam emitted by the defendant's operations. She knew that there was ice upon them when she went down them. It was held that, as it was not certain that she appreciated that the steps though known to be slippery were on this occasion dangerously so, she was not barred from recovery. In addition, Knowlton, J., said that it was important to consider that she had no way of leaving the mill save by going down the steps. It would seem, however, that among the risks which she assumed by entering the defendant's employment was the risk that from time to time her egress from the mill would be rendered dangerous by the collection of ice upon the steps; and therefore that the exigency alluded to was itself one of the dangers to which the known conditions of her employment subjected her. The court recognized that exigencies might exist which would justify a voluntary exposure to a known risk, as where the defendant had wrongfully exposed the plaintiff to a danger which he was unwillingly forced to encounter. The cases cited in

[1] Griffith *v.* Dudley, 9 Q. B. D. 357.

[2] 155 Mass. 155.

support of this are all cases in which the plaintiff had a common or individual right at law to find the premises or appliances free from danger, or where he encountered the danger in the performance of a legal or social duty.[1]

The case of Fitzgerald *v.* Co. was one brought at common law. It was intimated in Boyle *v.* R. R.[2] that were the plaintiff to bring his action under the Massachusetts Employers' Liability Act, an act substantially similar to the English Act of 1880, it would be arguable that he did not assume the risk if he continued in the employment through fear of losing his place, unless the jury found him to be culpably negligent. In O'Maley *v.* R. R. Co.[3] it was, however, decided that even though the action were brought under this act, a servant who remained in the employment with knowledge of the danger, though induced to do so through fear of losing his position, assumed all the risks, where the defect was one existing at the time that the servant entered the employment. The court intimated that it was open to discussion whether continuance with like knowledge of supervening defects would bar him. However, in the case of Lamson *v.* Co.[4] this question was finally determined in favor of the employer. The plaintiff was injured by a hatchet falling from a rack. He had been in the defendant's employment for many years. About a year before the accident new and unsafe racks had been put in in place of racks which were quite secure. The plaintiff complained to the superintendent that the hatchets were more likely to drop than when the old racks were in use. He was told that he would have to use the racks or leave. Chief Justice Holmes said: "The plaintiff on his own evidence appreciated the danger more than any one else. He perfectly understood what was likely to happen. That likelihood did not depend upon the doing of some negligent act by people in another branch of the employment, but solely on the permanent condition of the racks and their surroundings, and the plaintiff's continuing to work where

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[1] See *ante*, p. 19. Pomeroy *v.* Westfield, 154 Mass. 462, and Gilbert *v.* Boston, 139 Mass. 313, were cases of defects in the highway over which the plaintiff had a common right as a citizen to pass, created by the neglect of the municipality to keep it in good repair. The cases of Thomas *v.* Co., 100 Mass. 156, Mahoney *v.* R. R., 104 Mass. 73, and Dewire *v.* Bailey, 131 Mass. 169, were cases of obstruction to such highway caused by the defendant's wrong. Looney *v.* McClain, 129 Mass. 33, was a case of the wife of a tenant of a flat injured through the landlord's non-repair of the approaches thereto, and Eckert *v.* R. R., 43 N. Y. 502, was a case where the plaintiff had exposed himself in order to save a life imperilled by the defendant's negligence.

[2] 151 Mass. 103. [3] 158 Mass. 133. [4] 177 Mass. 145.

he did. He complained, and was notified that he could go if he would not face the chance. He stayed and took the risk."[1] Now, here it is to be noted that the injury did not result from the plaintiff's doing any particular thing which brought him into immediate contact with the racks. It was due to what Lord Herschell calls a risk which might never eventuate in injury and which did not require any action on his part to make it injurious. Were it not for Chief Justice Holmes' statement that "the likelihood of the accident did not depend upon the doing of some negligent act by people in another branch of employment," it would seem clearly that Lord Halsbury's distinction between a general and a particular risk had been repudiated.[2]

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[1] See, however, Wells & French Co. *v.* Kapaczynski, 218 Ill. 149, which would seem to intimate that where a command is given to perform certain work involving the use of obviously dangerous machines, the servant does not assume the risk, though he is not misled by the order through trusting to his foreman's superior knowledge, nor is so peremptorily ordered that he had no opportunity to weigh the consequences, his obedience being deliberate and with full knowledge of perfectly open and obviously dangerous defects in the machines. Scott & Hand, JJ., and Cartwright, C. J., dissented. "Under the circumstances," said Scott, J., "the order presented to him the same alternative which he had under the law, and he must therefore be regarded as having deliberately elected to incur a known risk rather than leave the employment of his master."

[2] It is doubtful if this dictum means more than this, that where the defect was such that it could only become effective for injury by some future misconduct of a fellow servant, the plant, though known to be physically imperfect, cannot be said to be known to be dangerous, since the plaintiff is not bound to anticipate any misconduct of his fellow workmen. Now of course by the Act of 1887 the defense of common employment has ceased to avail the master whose plant, though originally good, has become unsafe through the carelessness of a fellow servant. The servant only accepts the risk of injuries probable from the normal use of the defective plant or appliance in question, but not such further risks as may be added thereafter by the subsequent negligence of other servants. The master therefore would probably be liable if a mere defect ordinarily harmless was made not merely dangerous, but actually injurious by the negligence of a fellow servant. The fact that the servants are in different departments is important only in this, that the servant cannot be expected to learn of misuse of the defective tool, whereas, if they are working together, he probably knows not merely that the tool is physically defective, but also that on the occasion in question it has been, or on other occasions habitually is, misused. So that the defect, though ordinarily harmless, is in fact known at the time to be actually a source of danger or likely at any time to become so. It seems impossible that Mr. Justice Holmes intended to intimate that employment in the same or a different branch of employment would be of any further importance, and that the act excluded from its operation those workmen who were immediately associated with one another; in a word that the act was intended merely to introduce the doctrine repudiated as a whole in Farwell *v.* Boston, that as to certain conditions of service the servant accepted the risk of the negligent conduct of those workmen who worked in the same immediate department and in close association with him, and of no others.

In New York, in Laning *v.* R. R.,[1] Folger, J., regarded the whole question as one of contributory negligence, and held that the plaintiff's knowledge of the intoxicated condition of a fellow servant was a fact for the jury and merely cast upon the plaintiff a higher degree of care. But in Gibson *v.* R. R.[2] it was held that a conductor who was struck and killed by the projecting roof of a depot building was barred from recovery by his knowledge of its character. He took service subject to the risks incident to the position and mode of construction of the depot, and if the defendant did nothing after the employment to aggravate the danger, there was no liability. In Sweeney *v.* Envelope Co.[3] it was held by Danforth, J., that a servant accepts a service subject to the risks of the use of such machinery as is then in use therein. The defendant if he chose might carry on the business with an old rather than a new machine, and could not be required to keep in his employ a servant who would not run it. Threats of dismissal if the servant will not work at the machine are therefore not coercion. He distinguishes sharply between the permanent character and plan of the plant, as to which the owner must be allowed the fullest freedom of choice, and failure to maintain in good repair such premises and appliances as the owner may choose to use. However, in Bajus *v.* R. R.,[4] while Danforth, J., still maintained his previous opinion, substantially that of Lindley, L. J., in Yarmouth *v.* France, the majority of the court held that there was no difference between supplying an originally defective appliance and allowing a good one to fall into disrepair, and that a servant who knew of either condition, though supervening since his employment, assumed the risk thereof.

This attitude, substantially that of the Massachusetts courts, had been adopted by practically all American jurisdictions.[5] In North Carolina alone[6] is Smith *v.* Baker followed. In Alabama, Holborn *v.* R. R.,[7] a case brought under an Employers' Liability clause of the code of that state, in which it was decided that mere continuance after knowledge of the defect did not bar the plaintiff from recovery unless he had failed to notify his employer, was

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[1] 49 N. Y. 521.
[2] 63 N. Y. 449.
[3] 101 N. Y. 520.
[4] 103 N. Y. 312.
[5] See, for an admirable collection of cases, Labatt, Master and Servant, chaps. xvii and xx.
[6] See Lloyd *v.* Hanes, 126 N. C. 359.
[7] 84 Ala. 138.

overruled by Railroad *v.* Allen,[1] on the authority of Thomas *v.* Quartermaine (the court apparently not having seen the later case of Smith *v.* Baker decided the preceding year). In the Supreme Court of the United States no case has been decided where there has been both a knowledge of the defect and a complaint of it, but the general tendency of authority is in favor of the position taken by the Massachusetts court. However, in Railroad *v.* Archibald,[2] White, J., says: "Where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it *without notice to his employer*,[3] he cannot recover for an injury from the defective appliance thus voluntarily and negligently used."

Upon one point there has been considerable difference of opinion in the American authorities. Where the statute has imposed upon a master the duty of taking some particular precaution to protect his servant, it has been decided, in Baddeley *v.* Lord Granville,[4] that the servant, by continuing in the employment with the knowledge that the statutory protection was not afforded, did not thereby consent to its breach. As was said by Lord Bramwell, the most ardent champion of the strict application of the maxim *volenti non fit injuria*, in the case of Britton *v.* Great Western Cotton Co.: [5] "In such case the plaintiff is not placed in the dilemma which arose when the action is for breach of a duty at common law; that dilemma is this, either the danger was obvious or it was not. If obvious, the servant must have known it as well as the employer (he would thereby be barred by the maxim); if it was not obvious, there was no negligence in the employer. Here the duty is statutory. If the deceased dispensed with the performance of it, knowing the duty and knowing the danger, I think he would be *volens*, but not otherwise." Whether the servant, even, knowing of the statute creating the duty, can expressly agree to dispense with its performance, would seem to depend upon whether a penalty has been imposed upon its breach. Such a penalty would indicate that the statute was not intended to confer a merely personal privilege and benefit upon the servant which he could if he chose waive by express agreement to do so, but was designed to impose a rule of conduct in which the state has an interest and the breach of which it regards as an offense against itself. The very purpose

[1] 99 Ala. 374 (1892).
[2] 170 U. S. 665.
[3] The italics are the writer's.
[4] 19 Q. B. D. 423.
[5] L. R. 7 Exch. 130; 41 L. J. Exch. 99.

of imposing the penalty is to enable the state to enforce by penal action compliance with the statute; the servant's economic inferiority and dependence preventing his right of suit from being an efficient guarantee of its enforcement. In Griffith *v.* Dudley [1] it had been held that a servant may by express contract waive the benefit of the Employers' Liability Act. That act, however, was intended merely to remove from the servant certain disabilities under which at common law he labored, and he might therefore if he please consent to waive its benefit. In Kinsley *v.* Pratt [2] it was held that an employee by entering a factory in which the owner had failed to furnish the protection prescribed by the Factory Acts of 1886, assumed the risk of such lack of protection if she knew that no protection was in fact given.[3]

In Narramore *v.* R. R. Co.,[4] Taft, J., holds that mere knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, does not amount to an assumption of the risk such as will bar recovery. He says the only ground for passing such a statute "is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by a positive law because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose to permit the servant to contract the master out of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute." He was of the opinion therefore that even an express consent to waive the performance of the act would be invalid, the statute being imposed for the protection of the servant and in the interest of the public, and enforceable by criminal prosecution. *A fortiori*, no waiver will be implied from mere continuance in service with knowledge of its breach.[5]

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[1] 9 Q. B. D. 357. [2] 148 N. Y. 372.

[3] The case was decided largely on the authority of O'Maley *v.* Gas Light Co., 158 Mass. 135, a case decided not under an act providing for specific precautions and imposing a penalty for their violation, but under the Massachusetts Employers' Liability Act.

[4] 37 C. C. A. 499.

[5] Compare the language used by Wills, J., in Baddeley *v.* Granville: "As to the result of past breaches of the obligation, people may come to what agreements they like, but not as to future breaches, of which there ought to be no encouragement given to the making of an agreement between A and B, that B shall be at liberty to break the law which has been passed for the protection of A."

The argument of Taft, J., would seem to expose conclusively the fallacy of the position taken by Bartlett, J., in Knisley *v.* Pratt, that "while the statute contemplates the protection of a certain class of laborers it does not deprive them of their free agency and the right to manage their own affairs." As he says, it is because their economic inferiority deprives them of freedom to contract that the legislature deems it wise to interfere for their protection. Such economic inferiority would equally force them to contract to exempt the master, just as it prevented them from contracting to force the master to secure them protection.[1]

However, as Taft, J., points out, a servant may be debarred from recovering for injury received from the breach of a statutory duty on his master's part by his own contributory negligence. A servant who continues to work, knowing that a statutory protection has been omitted, while he does not waive the liability for the violation of the statute, is bound to use care commensurate with the added risk to avoid the injurious consequences of such a breach of the statute.[2]

In many cases the plaintiff, who was not in the defendant's employment, but who was working on the defendant's premises in the performance of his employment with another, either an independent contractor with such defendant, as in Woodley *v.* R. R.,[3] Stevens *v.* Gas Co.,[4] Wagner *v.* Elevated R. R.,[5] or Membery *v.* R. R.,[6] or a shipper of goods, as in Miner *v.* R. R.,[7] or a railroad company which had trackage rights over the defendant's lines, as in Wood *v.* Lock,[8] has been held to be barred by his knowledge of the danger from recovering for injuries received from the dangerously defective condition of the premises. At first glance it would seem that the servant did not encounter the risk voluntarily, but was forced to do so in the performance of a duty which he owed to his master; and that he had a right, under the recent decisions in trade and labor cases, to work for his master, with which the defendant could not directly or indirectly interfere, by persuading his master to discharge him, or by rendering the service so dangerous that he would be forced

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[1] See Monteith *v.* Kokomoko Co., 159 Ind. 149, following Narramore *v.* Co. and the cases cited in the latter case.

[2] Such are the cases of McCarthy *v.* Foster, 156 Mass. 511, Keenan *v.* Electric Light Co., 159 Mass. 376, Krause *v.* R. R., 53 Oh. St. 43, Schlemmer *v.* R. R., 207 Pa. St. 198, often cited as supporting the decision of Knisley *v.* Pratt, *supra.*

[3] L. R. 2 Exch. 384. [4] 73 N. H. 159. [5] 188 Mass. 437 (1905).

[6] 14 App. Cas. 179. [7] 153 Mass. 398. [8] 147 Mass. 604.

to abandon it. And that therefore the relation between the defendant and plaintiff was not one which was wholly voluntary on either side, or which the plaintiff could be said to have freely entered into. However, it is to be noted that the plaintiff's right upon the premises is dependent upon his employer's relation to the defendant, as in Bowe *v.* Hunking.[1] If his employer should choose to engage to do work upon a building patently defective,[2] or if he should choose to contract to do repair or construction work upon a railway, as in Woodley *v.* Ry., while the ordinary operations of the line were going on, the defendant would owe no duty to such employer save not to enhance the open and manifest dangers of the job by some additional fault of omission or commission. So the servant of a railroad which leases rights over tracks patently defective has no right to expect that the lessor line shall afford him better protection than it does to its own servants. His employing company has entered into an agreement whereby its business shall be conducted upon the defendant's tracks under like conditions as the defendant conducts its own traffic. So much but no more could the plaintiff's employer have asked; so much and no more can the plaintiff himself ask. The defendant's duty to him is no greater than the duty to his employer. In Miner *v.* R. R., however, the question is somewhat more difficult. In that case the plaintiff's employer was a shipper. He was sent to obtain from the railway goods which had been consigned to his employer. His employer, and so he, had the right therefore to find the premises safe for the unloading of goods, and so, had there been merely some defect creating a slight danger in the approaches, it would seem that the plaintiff's employer would have had the right to encounter it in order to obtain his goods, and so that the plaintiff might equally encounter it without assuming the risk thereto. However, the facts show that the defendant's only negligence was in affording the plaintiff a place to unload the car, which was dangerous by reason of its proximity to the rails, whereby the plaintiff's horse was frightened. And it appeared that the plaintiff might, at the cost of some personal inconvenience and trouble, have caused the car to be shifted to a point at which it might have been safely unloaded. If he chose to encounter the risk rather than undergo a slight inconvenience and take a little trouble, it cannot be said that he

[1] 135 Mass. 380.

[2] As, had the defect been open and notorious, would have been the case of Stevens *v.* Gas Co.

was reduced to the alternative of foregoing his right to receive the goods or to run the risk in question.[1]

Thus it has been seen that while in England the pressure of the servant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment, the American cases stoutly deny it any such effect. It may well be that the different economic conditions of the two countries may account for this. In England work has become, especially during the development of the present position of English courts on this point, increasingly difficult to obtain. The loss to a workman of his job is a very real misfortune, the fear of losing it a very pressing species of compulsion. On the other hand, in America as yet there is normally no dearth of work for competent workmen. If one job is dangerous, another can probably be found. Add to this the known tendency of American workmen to take desperate chances touching their safety, and it may well be that in the vast majority of cases any real pressure arising from fear of loss of employment is practically non-existent; and the risk is encountered through mere thoughtless recklessness or disinclination to leave a position in other respects satisfactory. That which in England effectually coerces and controls the will may well have no such effect in America.

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[1] So in McCarthy *v.* Foster, 156 Mass. 511, the plaintiff was the servant of a tenant, and was using an elevator which the landlord was bound to keep in repair. It would seem therefore that under the authority of Looney *v.* McClain, 129 Mass. 33, his master would have been entitled to find the elevator in good order, and would have had the right to use it though slightly dangerous, and the plaintiff in the right of his master would equally have been entitled to have encountered a slight risk rather than forego such a use. See Shoninger Co. *v.* Mann, 3 L. R. A. (N. S.) 1097 (Ill., 1906), *accord.* However, the evidence showed that the plaintiff had, by his own conduct in piling merchandise against the slats of the elevator, added to the risk. His injury therefore was due to his own contributory and negligent act in increasing the risk which arose from the obviously defective condition of the elevator.